FILED
NOV 13 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

No. 323

ORGANIZED VILLAGE OF KAKE and ANGOON COMMUNITY ASSOCIATION, *Appellants*,

v.

WILLIAM A. EGAN, Governor of the State of Alaska.

On Appeal From the District Court for the State of Alaska

BRIEF OPPOSING THE MOTION TO AFFIRM OR DISMISS

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINION BELOW

The opinion below (Juris. Stmt. p. 17) is now reported. 174 F. Supp. 500.

STATEMENT OF THE CASE

Appellants, Organized Village of Kake, and Angoon Community Association, are incorporated villages of Thlinget Indians, chartered under federal law (R. 6,

29). As such, they exercise fishing rights in Alaskan waters (R. 7, 30). With those rights appellee asserts the lawful authority to interfere pursuant to Alaskan state law. (R. 52, 54-55.)

Possessory rights of the natives in Alaska have been given protection by the Federal government at least since the proviso of Sec. 8 of the Act of May 17, 1884, 23 Stat. 24, 26 (quoted *post*, p. 13; see other statutes cited R. pp. 226-227). At the time of admission of the State of Alaska these rights found express protection in the following provision of the Statehood Act of July 7, 1958, 72 Stat. 339, Sec. 4 of which provided (quoted here to reflect an amendment resulting in striking the material bracketed and inserting the italicized matter, as a result of the Alaska Omnibus Act of June 25, 1959, 73 Stat. 141, § 2):

> "Sec. 4. As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property [, belonging to the United States or which may belong to] *(including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for* said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the

> Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation: . . ."

Appellants rely on the foregoing Sec. 4 to preclude the exercise of jurisdiction by the State over their fishing. (R. 11, 34.)

Concurrently a transitory federal jurisdiction, quite beyond that of Sec. 4, over fishing and wildlife generally (and which will terminate January 1, 1960), has been bruited in the case thus far. It arises from Sec. 6(e) of the Statehood Act (as amended by the Omnibus Act) which provided—

> "That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety [legislative] *calendar* days after the Secretary of the Interior certifies[1] to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest: . . ."

The immediate question revolves about certain fishing properties purchased and owned by the United States in trust for appellants, including canneries, fish traps, and related works. (R. 7, 29.) Alaska has forbidden fish traps generally (Ordinance No. 3, quoted *post*, pp. 13-14), as did the Secretary of the Interior in deference to Alaska's views in the Secretary's regula-

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[1] The Secretary of the Interior certified April 27, 1959. Cong. Rec. April 28, 1959, p. 6169; *id.*, p. 6247, Exec. Comm. No. 903. As a result, the transitory general authority over fish and wildlife terminates January 1, 1960.

tions pursuant to § 6(e) above, for the year 1959—save as to Indian fish traps where the state had disclaimed jurisdiction pursuant to Sec. 4 (R. 8-9; 31-32).[2]

Notwithstanding the renunciation of jurisdiction by the state pursuant to Sec. 4, appellee threatened enforcement against appellants of a statute of Alaska abolishing fish traps (17 Session Laws of Alaska 1959, amended by 95 S.L.A. 1959, Juris. pp. 40, 41). This threat precluded appellants from determining through ordinary legal remedies their rights to freedom from state regulation of their fishing properties without incurring irreparable injury. (R. 10, 33, 12, 35.) Actual seizure of one of appellant Kake's traps was effected. (R. 14-15.)

Appellants sought an injunction against the interference with their federally recognized and protected fishing rights. Suit for injunction was brought in the District Court for the State of Alaska. A temporary

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[2] "The proposal to eliminate fish traps in the pending regulations was motivated by the desire of the Department to adjust its actions as quickly as possible to the desires of the Alaskans in regard to the control of their natural resources. The people of Alaska twice voted in referendum to abolish traps.

"As you know, under section 4 of the act of July 7, 1958 (72 Stat. 339) the State of Alaska disclaimed jurisdiction over any lands or other property, including fishing rights, held by any Indians, Eskimos, or Aleuts, or which is held by the United States in trust for them, and recognized continuing federal authority thereover. This disclaimer, coupled with the longstanding supervisory control exercised for the protection of the interests of Indians, Eskimos and Aleuts by the Department of the Interior, accounts for the provision that the proposed regulations will not eliminate operation of fish traps by Indian tribes or villages. The Secretary will continue to control the operation of traps by Indian tribes and villages." *Letter of March 10, 1959, Secretary of the Interior to Area Director, Juneau,* R. 229.

injunction was denied and the suit was dismissed, with an opinion of July 1, 1959 (Juris. pp. 19-29). While the court below recognized the outright collision between state and federal power (pp. 20-21), it held that the state owns the tidelands where the traps are to be installed as a result of the equal-footing doctrine; that "Indian fishing rights do not include the right to fish with forbidden gear or in a manner prohibited to other citizens of the state" (p. 22); that the equal-footing doctrine means that the state has acquired not only the tidelands but "local sovereignty" as well (pp. 22, 24); that the "State has an absolute right to control and regulate the killing of game as its judgment deems best in the interest of the people" (p. 24).

Accordingly, the court sustained the validity and application of State Ordinance No. 3 (*post*, pp. 13-14), which abolished the use of fish traps (p. 27), holding that for the Secretary to authorize the fish traps by appellants "would seem to impair the equal footing standing of the new state" (p. 26). It concluded not only that the Secretary was without authority but "that the State of Alaska has authority to prohibit all fish traps in Alaska waters, including those of the plaintiffs, and plaintiffs are not entitled to the relief here sought." (p. 27.)

ARGUMENT

The Case Is Not Moot

The State, without jurisdiction over Indian fishing as a result of Sec. 4 of the Statehood Act, nevertheless asserts jurisdiction under a state Constitutional Ordinance No. 3 to prohibit the use of fish traps by appellants, and has actually seized one of appellant Kake's

traps (R. 14-15). Ignoring questions as to its own jurisdiction, it then pins its case for mootness on a supposed expiration of federal jurisdiction. In so doing, the State points to the expiration of a quite different provision of the Statehood Act, Sec. 6(e), which made the Federal Government a temporary fish-and-game department of the State until the new state could take over regulation of fish and wildlife generally. The State has provided for taking over these latter functions, as it might under Sec. 6(e), and they will be taken over January 1, 1960. Prospectively, then, the State says it is no longer possible for the Secretary of the Interior to regulate fish traps in Alaskan waters, and despite the existence of Sec. 4, denying state jurisdiction, that it is possible for Alaska to close up appellants' fishing.

The continued application by the State of its Ordinance No. 3 in plain defiance of the jurisdiction which it "forever disclaimed" in Sec. 4 of the Statehood Act manifestly would prevent the case from becoming moot, for the State has not recanted that assertion of jurisdiction and right. A plain undertaking by appellee that there will be no continued assertion of this right on the part of the State to close up the Indian fisheries might warrant serious consideration on some issue of mootness. The fact is that there is no expiration either of the State's Ordinance No. 3 or of Sec. 4 of the Statehood Act.

The State's argument of mootness is based on the fallacy of its pointing not to its own jurisdiction, which was called in question by the complainants (R. 11-12, 33, 34), but to the jurisdiction of the Secretary of the Interior acting as a tempory fish-and-game depart-

ment. True enough, the Secretary has long regulated commercial fishing in Alaska pursuant to the Act of June 6, 1924, 48 U.S.C. § 221 (Juris. Stmt. pp. 33-34); the regulations are familiar in the Code of Federal Regulations. (50 C.F.R. Subch. F, Alaska Commercial Fisheries, Pts. 101-130.) And true enough, with statehood, questions respecting continued regulation were raised, and, in the Statehood Act, dealt with. Section 6(e) of the Statehood Act provided for intermediate secretarial regulation, with assumption of the regulation by the new State when ready. And as a result of Sec. 6(e), the Secretary of the Interior made certain modifications in the regulations pursuant to "existing law"[3] noting (24 Fed. Reg. 2054; No. 54, Mar. 19, 1959) that "One of the most important issues raised by the proposal to amend these regulations is the issue presented by the proposal to prohibit, beginning in 1959, the use of fish traps in Alaskan waters, *except those operated by Indian tribes or villages in certain waters.*" The amended regulations prohibited fish traps (§ 102.10) except those operated by these appellants (and appellants in a companion case) covered by § 115.26 of the regulations (Juris. Stmt. pp. 39-40).

But it does not follow that this temporary provision is the "authority" (as the State calls it) for appellants' fishing rights. Those rights are recognized and respected and dealt with by federal statute in Sec. 4; the State has disclaimed *any* jurisdiction over those rights. The State can, then, accept transfer of the secretarial intermediate jurisdiction over everyone else in Alaska—and will take over January 1, 1960.

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[3] See *Ketchikan Packing Co.* v. *Seaton*, 267 F. 2d 660.

But under Sec. 4 it is powerless to take over to any extent a jurisdiction respecting appellants' fishing rights.

Accordingly, the argument amounts to no more than to say that because the Secretary has prospectively lost authority which he previously possessed to regulate broadly all commercial fishing in Alaska, he either could invest or has invested the State with jurisdiction in defiance of Sec. 4, or that the State is authorized to seize jurisdiction, or deprive appellants of their fishing rights because of some intermediate regulation addressed broadly to the Secretary's temporary fish-and-game-department duties notwithstanding the recognition which those regulations acknowledged were retained by appellants.

The Court Below Is the Highest Court of the State

Perhaps the mere fact that the respective parties are all agreed that the District Court for the State of Alaska is a state court and the highest court of the State in which the question could be raised is inconclusive, for the Circuit Justice considering the motion for a stay indicated that the Court might want development of that jurisdictional aspect through postponing the question of jurisdiction to the merits. (Opinion of Mr. Justice Brennan, July 11, 1959, p. 9.) Since in that event under the practice of the Court the parties would be alerted to a full development, we do not here do more than indicate that prior to filing the complaint in the court below, Alaska had become a state (72 Stat. 339) and all territorial vestiges whatever had been obliterated so that the court's status as a territorial court had ended (*Benner* v. *Porter,* 9 How. 235, 242-244); Alaska itself had accepted the District Court

as an interim court (Const., Art. XV, § 17) (quoted *post* p. 13); Congress had agreed in the Statehood Act, § 18, (quoted *post* p. 14) and the United States District Court had not yet been organized. The cumulative result is that it is impossible for the court below to be anything but a state court. We note also that no other court than that interim court existed as a state court at the time; and like the justice-of-the-peace court in *Grovey* v. *Townsend*, 295 U.S. 45, 46, it was the highest court of the state in which a decision could be had—thus placing it squarely within the jurisdiction of this Court.

The Federal Question Is Substantial

Notwithstanding the total disclaimer by Alaska of any right to regulate Indian fishing in Sec. 4 of the Statehood Act, the court below squarely held that the State did have "an absolute right to control and regulate the killing of game as its judgment deems best in the interest of the people" (Juris. Stmt. p. 24); that "The authority conferred upon the Secretary by existing law . . . should not be permitted to impair the powers or rights of the new state which come from the status of statehood. To do otherwise would seem to impair the equal footing standing of the new state." (*Id.*, pp, 25-26.) The court concludes (*id.*, p. 27) "that the State of Alaska has authority to prohibit all fish traps in Alaska waters, including those of the plaintiffs, and the plaintiffs are not entitled to the relief here sought."

Thus, notwithstanding that Congress said in the Statehood Act, Sec. 4, that Alaska should *not* have jurisdiction until Congress might later act, and notwithstanding that the State accepted that provision and disclaimed accordingly; and notwithstanding that

Congress has made no other move to invest the State with jurisdiction to do what federal statute has established it shall not, the Court below has overridden that clear federal statute because of an absolute right in the state, or because of the equal-footing doctrine. This is denial of validity of Sec. 4 under § 1257(1) of the Judicial Code. *United States* v. *Lynch*, 137 U.S. 280, 285.[4] Likewise, the court below sustains State Ordinance No. 3 (Juris. p. 25), as authorizing the invasion of appellants' fishing rights, thereby rejecting appellants' contentions based on the claim of federal right that the State Ordinance is invalid. This is affirmance of the validity of a state statute within the meaning of 1257(2) of the Judicial Code.

To reach the conclusion that either the federal or State statute is valid and effective clearly requires analysis and exposition; it is impossible to say that any settled principles already enunciated have foreclosed appellants' contentions where Congress has so plainly supported them. The questions are therefore substantial. Robertson & Kirkham, *Jurisdiction Sup. Ct. U.S.* § 58 (1951 ed.).

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[4] The case cited states the rule, "The validity of a statute or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry." Note that here Alaska denies the constitutionality (because of the equal-footing doctrine) and the legality (because of state fish-and-game jurisdiction under Sec. 6(e)) of Sec. 4 of the Statehood Act, and in this the State was sustained by the court below. And note that appellants deny the constitutionality and the validity of State Ordinance No. 3, purporting to regulate appellants notwithstanding the express provisions of Sec. 4 of the Statehood Act. To the extent of appellants' fishing rights both statutes cannot subsist; either Sec. 4 of the Statehood Act, or State Ordinance No. 3, is invalid.

Conclusion

The motion to dismiss or affirm should be denied, and probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

(See Appendix to Jurisdictional Statement for other items)

Act of May 17, 1884, 23 Stat. 24, 26, Sec. 8

* * * * * * * * * *

Provided, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: * * *

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Constitution of the State of Alaska

Transfer of Court Jurisdiction

Section 17. Until the courts provided for in Article IV are organized, the courts, their jurisdiction, and the judicial system shall remain as constituted on the date of admission unless otherwise provided by law. When the state courts are organized, new actions shall be commenced and filed therein, and all causes, other than those under the jurisdiction of the United States, pending in the courts existing on the date of admission, shall be transferred to the proper state court as though commenced, filed, or lodged in those courts in the first instance, except as otherwise provided by law.

* * * * * * * * * *

Ordinance No. 3

Abolition of Fish Traps

Ballot

Section 1. Each elector who offers to vote upon the ratification of the constitution may, upon the same ballot, vote on a third proposition, which shall be as follows:

"Shall Ordinance Number Three of the Alaska Constitutional Convention, prohibiting the use of fish traps for the taking of — Yes ☐

salmon for commercial purposes in the coastal waters of the State, be adopted?" No ☐

Act of July 7, 1958, 72 Stat. 339, 350

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SEC. 18. The provisions of the preceding sections with respect to the termination of the jurisdiction of the District Court for the Territory of Alaska, the continuation of suits, the succession of courts, and the satisfaction of rights of litigants in suits before such courts, shall not be effective until three years after the effective date of this Act, unless the President, by Executive order, shall sooner proclaim that the United States District Court for the District of Alaska, established in accordance with the provisions of this Act, is prepared to assume the functions imposed upon it. During such period of three years or until such Executive order is issued, the United States District Court for the Territory of Alaska shall continue to function as heretofore. The tenure of the judges, the United States attorneys, marshals, and other officers of the United States District Court for the Territory of Alaska shall terminate at such time as that court shall cease to function as provided in this section.

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